United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7091

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

WILLIAM TERNER, Pro Se,

Plaintiff-Appellant,

-against-

Hon. JAMES D. HOPKINS, Justice of the Appellate Div. of the State of N.Y.; Hon. LEONARD RUBENFELD, J.S.C. of the State of N.Y.; JAMES DEMPSEY, Esq.; Hon. ALVIN R. RUSKIN, J.S.C. of the State of N.Y.; Hon. HAROLD L. WOOD, J.S.C. of the State of N.Y.; N.Y. State Sen. BERNARD G. GORDON, Chairman, N.Y.S. Judiciary Comm.; Hon. MARTIN B. STECHER, J.S.C. of the State of N.Y.; Hon. WM. A. WALSH, JR., J.S.C. of the State of N.Y.; JERALD S. KALTER, M.D.; Hon. JOHN C. MARBACH, J.S.C. of the State of N.Y.; MILDRED TERNER; KRAFTCO CORP.. and MFG. HANOVER TRUST CO. (Transfer Agents for Kraftco Corp.),

Defendants-Appellees.

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P/S

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Violations of human rights will often come to light sooner or later. A popular saying can be applied to this fact: "Murder will out." This saying is so general that three of the greatest of writers have used it: Chaucer, "Mordre wol out, certain it wol not faille"; Shakespeare, "Murder, though it have no tongue, will speak With most miraculous organ"; and

Cervantes simply, "Murder will out."

On at least two occasions the Appellant's investigators caught his adulterous wife in trysts lasting into the wee hours of the morning in the same love next with the family doctor. The wife and her doctor lover admitted those private meetings in a nephew's apartment but insisted that they were alone together for eleven hours and not the thirteen hours logged by the investigators and that the purpose of the meetings was for conferences although on one occasion they admitted to having shared a midnight ordered-in lobster dinner. (Record No. 21, Ex. B-1, P. 20)

She was overheard to say on one of the occasions when she and the doctor were leaving the love nest and notice Appellant's investigators watching them leaving "To hell with it." (Record No, 21, Ex. B-1, P. 19)

The Court bought the conference explanation and gave her a divorce on the ground of mental cruelty and denied the Appellant's divorce on the ground of adultery. A pattern developed in the New York State courts in which Appellant was whipsawed by one stunning legal defeat after another in which the courts permitted unchecked court irregularities, judicial prejudice, perjuries, subornings of evidence and witnesses, judicial intemperance, clear evidence that the Judge's mind was made up before end of trial as to how he would rule, the refusal of Judges to accept properly submitted motion papers or to even read the first page, unprofessional and unethical conduct practiced by the wife's attorneys and condoned by the court and

rulings that bore absolutely no resemblance to the documented facts presented in its court.

Appellant's sense of justice was so outraged that he began to investigate. He felt that as a citizen of a free country he was entitled to equal treatment. His investigation brought to light the circus tent extravanza of his wife's lawyer, James Dempsey, where many judges were lavishly entertained without either host or judge revealing their personal and social relationship in open court.

This is an appeal brought against seven state judges, two attorneys, one who is a state senator, one medical doctor (the named corespondent, appellant's former wife, (now married to the named corespondent), and two corporate defendants.

The judges filed one answer. The two corporate defendants filed a combined single answer. The other four defendants did not file answers.

The State Attorney General representing the appellees state judges asks this Court to affirm the decision of the District Court. Yet, the State Attorney General attacks that decision. Judge Knapp unequivocally conceded that a well documented, soundly presented case should not be rejected by the courts because of so-called judicial immunity and/or judicial insulation.

The District Court took issue with the facts and <u>not</u> the law.

Therefore, it was Judge Knapp's interpretation of the facts presented to him by plaintiff and not the law presented to him by the State Attorney General that determined his decision. (JA 163, 164)

Point IV of this brief is centered in depth on the United States Supreme Court's justification for the federal court guaranteeing constitutional rights deprived by a state court. The Court cites specific state abuses that are the obligation of federal courts to rectify: - "prejudice, neglect, intolerance or otherwise."

Appellant submitted to the District Court manifold documentation of his having been subjected indeed, by the state court to each and every one of these quoted abuses. The amended complaint and supporting papers comprise fifteen hundred pages including some fifty exhibits - practically all of which are either third party affidavits, court minutes or other court records.

The District Court decision now being appealed affirms appellant's legal authority to bring such federal action and does not dispute the credibility of the abuses submitted or the documentation of same. That decision focuses attention on the degree of proof of state judges having allegedly accepted a corrupt contribution to prejudice their decisions in favor of the donor. Appellant never made such charges unless one wishes to construe that a state judge in the habit of being lavishly entertained by a host/attorney litigating before him could naturally be beholden to the host/attorney for a standard of living not otherwise possible on a state judge's present sala

The major point is not what either entertained judges or

host/attorney gained from their personal and social relationship but rather if the appellant was denied equal justice under the law because of such a social and personal relationship not having been revealed by judges or attorney to afford appellant the opportunity to request another judge who was not lavishly entertained by the adversary attorney.

A juror, whose individual judicial role is far less important than a judge -- trying a case without a jury, is expected to not perjure himself when normally asked if he knows any of the parties connected with the pending litigation. Should that juror not disclose a personal or social relationship with one of the parties and if this fact is documented -- even after a decision is rendered -- then that decision most surely would be held null and void on the aforementioned ground. In fact, the juror who refused to reveal subject relationship would additionally be liable for criminal prosecution.

The reason for that juror withholding information critical to an impartial trial is not the criteria. There are countless possible reasons why a juror might beforehand favor one side or the other. One cannot brand that juror with having accepted a corrupt contribution as the exclusive motivating force for the juror's dishonesty. Nor is it reasonable to defend that juror's dishonesty by stating that since there was no evidence of a corrupt contribution to that juror by his friend -- that the juror is not guilty of

perjury.

The question of whether a judge received a corrupt contribution while not disclosing his personal and social relationship with one of the parties connected with the litigation being adjudicated by that judge is likewise immaterial. It is respectfully submitted that an act of judicial omission in not notifying all parties in open court that a personal and social relationship exists between the presiding judge and the adversary attorney is no different than the act of commission of perjury by the aforementioned theoretical juror. In fact, the juror could possibly claim personal ignorance of the serious legal implications and consequences that could result from his withholding the fact of a personal or social relationship between himself and one of the parties connected with the litigation in the denial of equal protection under the law. A state judge cannot and should not claim such ignorance of the basic concept of equal protection under the law.

The motivation and/or motivations for a judge's prejudice are unimportant. The fact of and/or the appearance of prejudice is reason enough for the setting aside of such decisions.

Mr. Justice Marbach submitted a motion via the New York State Attorney General allegedly supporting the contention that the allegations submitted by plaintiff-appellant herein should be dismissed. The State Attorney General produced minutes of the

subject hearing held before Mr. Justice Marbach on April 24 and April 25, 1974 (JA 73-147). The relevant portion of those court minutes reveal that Mildred Terner's attorney James Dempsey, Esq., the senior partner of Dempsey and Spring, P.C. of White Plains, New York, asserts to Judge Marbach as follows:

> "*** I have had this not only in this Court your Honor. I had the same situation in the past few weeks in the Appellate Division, where without any notice at all, when I got there, Mr. Terner said the same thing about this same Mr. Gottlieb and the Appellate Division said: 'Not a bit of it. You go on.'***" (JA 93-94).

Judge Marbach states as follows:

> "THE COURT: I now learn, Mr. Terner, not that Mr. Gottlieb was retained the day before yesterday, but that you made that statement to the Appellate Division. I learned it not only from Mr. Dempsey, but I checked what happened on that appeal and learned that Mr. Gottlieb was being retained several weeks ago.
> THE PLAINTIFF: Not on this case your Honor" (JA 93).

Judge Marback indeed had permitted himself to first be influenced by attorney Dempsey to the extent of checking with the Appellate Division, Second Department as to the authenticity of

attorney Dempsey's derogatory allegations against plaintiff-appellant herein. The report received by Judge Marbach from the Appellate Division, Second Department was derogatory to plaintiff-appellant.

Only nine days before, on April 15, 1974, an order was signed by the Appellate Division, Second Department with Judge James D. Hopkins presiding, which denied plaintiff-appellant's appeal for a motion for a new trial based upon court irregularities, perjuries, and newly discovered evidence in the New York State, Westchester Court divorce litigation entitled Terner v. Terner, Index No. 7920/1970. The amended complaint which is the subject of the within appeal contains evidence of a personal and social relationship between attorney James Dempsey and Judge Hopkins which was never revealed at that hearing nor did Judge Hopkins disqualify himself to provide to plaintiff-appellant herein the option of requesting a presiding state justice that did not have a social and personal relationship with plaintiff-appellant's adversary attorney, James Dempsey, Esq. (JA 2-28).

Judge Marbach permitted the Appellate Court presided over by Judge Hopkins to color the credibility of plaintiff-appellant herein. This is clearly reflected in the court minutes of the New York State Supreme Court action entitled William Terner v. Mildred Terner, Index No. 1309/1971 (JA 73-147).

This chain reaction bias of one court influencing another has nothing to do with retrying the case or insulating a judge from a lawsuit as a result of an alleged unfair decision. The clear issue presented here is deprivation of plaintiff-appellant's constitutional rights because of prejudice. Judge Marbach relieved attorney Irving I. Erdheim of Erdheim, Shalleck and Falk of New York City, the former counsel for plaintiff-appellant herein and yet refused a few days of requested grace in order to have him represented by counsel of his choice. It is abundantly clear that Mr. Justice Marbach admittedly concedes that he would have permitted plaintiff-appellant herein the few days grace requested if Mr. Justice Marbach was not negatively prejudiced by the New York State Appellate Division, Second Department with Mr. Justice James D. Hopkins presiding, the recipient of lavish social entertainings by James Dempsey, Esq., the adversary attorney herein, which was not disclosed in open court by either Mr. Dempsey or Mr. Justice Hopkins. Judge Marbach states as follows:

> "THE COURT: I have been given no affidavit of engagement. I have no proof that you even have an attorney -- outside of your word -- and while, under ordinary circumstances, I would accept your word, it is not enough for the record of this Court." (JA 90).

The fact that New York State Justice Marbach admitted in the court minutes (JA 90, 93) that his conduct in the New York State Supreme Court action entitled William Terner vs. Mildred Terner, Index No. 1309/1971 was prejudiced by the report that he had received about appellant herein from the New York State Appellate Division, Second Department with Mr. Justice Hopkins presiding is only important in that Mr. Justice Marbach admits that he would have acted in a different fashion and would have complied with the request of appellant herein in absence of such a prejudicial report which was sought only after defendant-appellee James Dempsey, Esq. persuaded Mr. Justice Marbach to check with Mr. Justice Hopkins about appellant herein.

Except for the examinations of the judicial patterns that denied appellant herein his constitutional rights in New York State -- it would have made no difference whether Mr. Justice Marbach's prejudice emanated from Mr. Justice Hopkins or from a court maintenance worker. The fact is that Mr. Justice Marbach was indeed prejudiced and he has readily admitted that prejudice in the Court minutes of subject case.

In the State Attorney General's Answering BRIEF FOR APPELLEES STATE JUDGES (pages 2-3) he has seen fit to utilize as his Statement of the Case excerpts from the District Court's memorandum and order which referred to allegations that appellant is attempting to re-litigate the state court litigation in federal

court. An examination of the twenty-one counts contained in the amended complaint (JA 11-28) will reveal not one single allegation to attempt to motivate the District Court in re-litigating state actions. Indeed, all of the counts concern themselves with documented court irregularities, documented judicial prejudices, documented failures to disclose personal and social relationships between judges and appellant's adversary attorney, James Dempsey, Esq., documented perjuries -- permitted by the state courts, documented proofs of the state court's refusal to accept or to even acknowledge the proofs of such perjuries, documented proofs of subornings of evidence and the refusal of state courts to accept or acknowledge such evidence, documented judicial intemperance, documented proof via court minutes of a state court Judge (Mr. Justice William A. Walsh, Jr.) repeatedly stating that he wants his court record to reveal to the state Appellate Court how appellant was behaving. (JA 176) This was during trial and how could Judge Walsh have been so sure appellant would appeal unless the Judge knew before the end of trial that he was going to rule against appellant. The memorandum and order of District Court Justice Knapp filed January 9, 1976 (JA 160-164) does not

dispute appellant's legal authority to institute a federal action alleging deprivation by New York State of appellant's constitutional rights. The single controlling criteria in Judge Knapp's order and memorandum is that all appellant's allegations are rejected because appellant did not produce proof of an actual corrupt contribution given to a state judge by attorney James Dempsey and received by one or more of the state judges from attorney James Dempsey.

The documented judicial behavior of the state judges named here as defendants-appellees need not be dissected as to the motivation for such judicial impropriety. It suffices to substantiate the acts of judicial misconduct without proving the reason for same therein.

For Judge Knapp to state that James Dempsey "ever obtained a judicial decision to which the law and the facts did not entitle him" (JA 164) is inconsistent with the facts since in one judicial example of a state court judge's misconduct Mr. Justice Ruskin (JA 14-15) Amended Complaint count No. 4, refused to receive properly submitted motion papers, refused to even read the first page, refused to supply a court reporter and acted in a highly intemperate manner. How Judge Knapp can state, as he did in his memorandum and order filed January 9, 1976 (JA 160-164) that

the decision affecting appellant herein would have been the same is baffling since how can one judge determine how another judge will rule on submitted papers when the second judge refused to accept the properly submitted papers and even refused to read them. (Record No. 20, Ex. "7")

In accordance with some 1,500 pages of supporting documentation that accompanied the Amended Complaint submitted to District Court, the actual summation of points (a) through (e) as detailed in both Judge Knapp's order and memorandum filed January 9, 1976 (JA 160-164) and also copied verbatim and inserted in the New York State Attorney General's answering brief on behalf of the appellees state judges was summarized basically from background material and not from the essence of the case submitted to the District Court which was actually the points enumerated in the Amended Complaint A fair encapsulation of these same points is as follows:

> (a) In the basic divorce action the trial judge proved on the record that his mind was made up to rule against me prior to end of trial by his remarks "I want the Appellate Division to see how this man is behaving." (JA 176). The trial judge certainly could not have felt that I was going to appeal a decision in my favor, therefore he knew he was going to find against me. The record indicates an intemperate judicial attitude toward me. "I don't give a damn - I mean it." (JA 179).

(b) Trial court rejected applications for rehearing and a new trial. Since trial judge refused to accept or acknowledge perjuries, subornings of evidence in his own court, I was forced to secure outside proof in a separate conspiracy action against the corespondent, Dr. Jerald S. Kalter and my wife, now known as Mrs. Jerald S. Kalter. The trial with documentation of same - simultaneously with the submission of my 106-page brief, exclusive of exhibits, on the divorce action. That motion for a new trial contained court minutes and transcripts from an examination before trial that on countless occasions the trial judge had accepted as truth clear perjuries on behalf of Mildred Terner and Dr. Kalter. In fact, in trial judge's decision of May 24, 1973, astoundingly he cited as fact allegations I made in court that I said were fact but that the other side vehemently denied. I had to bring further proof in the form of newly discovered evidence to try to convince the judge that in his confusion in writing his decision when he pointed up my adversaries' lies as truth, I had to actually convince him that they were indeed truth since he was using their lies in his decision stating that they were the truth. Judge Walsh rendered a 17-page decision only four working days after simultaneously receiving the 530-page motion for a new trial and the 106-page brief on the main divorce litigation. Logic dictates that it would take more time than that just to read such voluminous papers and to dictate and have typed and proofed such a 17-page decision.

(c) The court refused to consider the consequences of sizeable

fixed interest charges appellant was burdened with, refused to give any consideration whatsoever to the huge federal and state capital gains taxes that had to be triggered in order for appellant to even attempt to comply with astronomical awards made to appellant's ex-wife considering that there were no minor children involved. Appellant offered to have an Internal Revenue Service field audit agent appear before Mr. Justice Walsh as a witness in order that Mr. Justice Walsh would receive first-hand information as to the impossibility for appellant to comply with the court awards. Mr. Justice Walsh's answer to appellant's offer to bring in an Internal Revenue Service witness was "We are not concerned with the Internal Revenue Service (JA 181). Mr. Justice Walsh actually apologizes on the record to Mr. Dempsey for not having been successful in trying to award Mr. Dempsey a $15,000 fee on top of $15,000 that Mr. Dempsey had admittedly received and all before a financial examination of appellant (Record, No. 21, Ex. B-9). The additional $50,000 fee that Judge Walsh awarded to Mr. Dempsey was exactly the amount that Mr. Dempsey offered to accept in lieu of a fee hearing.

(d) Appellant does not take issue with Mr. Justice Hopkins or Mr. Justice Marbach not permitting short adjournments to substitute attorneys. The issue with Mr. Justice Hopkins of the New York State Appellate Division, Second Department while the presiding judge in appellant's most crucial litigation was and is simply that Mr. Justice Hopkins should have disqualified himself before adjudicating a case because he and appellant's adversary attorney, Mr. James Dempsey had a personal and social

relationship and neither attorney nor judge disclosed that relationship in open court which he did not do.

(e) The question of attorney Dempsey's friendship with various judges being so close as to suggest corruption is not the point, but rather the entertained judge presiding over litigation involving his host/attorney benefactor without full disclosure of their relationship is, it is respectfully submitted, improper judicial conduct.

The Federal Government has seen fit to clarify and expand our code of ethics and sense of morality in government since Watergate. Compare a 1974 addition to the Federal Judicial Code, 28 U.S.C.A. §455 (Supp. 1976) which provides in (a) that any judge "shall disqualify himself in any proceeding in which his partiality might be questioned"; and then adds in (e) that "Waiver may be accepted provided it is preceeded by a full disclosure on the record of the basis for disqualification."

Ample authority has long existed requiring public officials entrusted with awesome publicly entrusted power to use that power for the public good and not violate the public authority entrusted to them.

As to the judges, the appellant seeks a holding that judges may not attend such extravaganzas as those which James Dempsey gave and not make this fact a matter of record so that an ordinary litigant like appelant can choose a judge who in his eyes is impartial and will give him equal justice under law, a requirement of the Due Process and Equal Protection clause of the 14th Amendment. Because of the failure of the State Court judges to make known their attendance at James Dempsey's circus tent extravaganzas or disqualify themselves, the appellant asks

for a declaratory judgment that all the State Court proceedings and and judgments involved be declared null and void, to wit, N.Y.S. Supreme Court, Westchester County, case entitled: Terner v. Terner, Index No. 7920/70; N.Y.S. Supreme Court, Westchester County, case entitled: William Terner v. Mildred Terner, Index No. 1309/71, and N.Y.S. Supreme Court, New York County, case entitled: William Terner v. Mildred Terner and Jerald S. Kalter, Index No. 22772/72.

POINT I

STATE COURT JUDGES ARE WITHIN THE REACH OF THE CIVIL RIGHTS ACTS FOR THE PURPOSES OF INJUNCTIVE AND DECLARATORY RELIEF.

In this case the plaintiff asks not only for injunctive but also for declaratory relief. The first two paragraphs of his prayers for relief in his amended complaint are:

> "1. Granting injunctive relief to plaintiff and therefore enjoining both temporarily and permanently any of the defendants from enforcing or effectuating any of the orders or judgments entered or to be entered in the case of Terner v. Terner, in the Supreme Court, Westchester County, N.Y.S., Index Number 7920/1970 and enjoining any further proceedings therein until the completion of this action.
>
> 2. Granting a judgment declaring all prior proceedings in the said case of Terner v. Terner null and setting same void and granting unto plaintiff a new trial in the above action in a venue outside the Courts of the State of New York." JA 27.

In such a situation State Court judges fall within §1 of the Civil Rights Act of 1871 42 U.S.C §1983 (1970).

This circuit so held in Erdmann v. Stevens 458 F. 2d Cert. Denied 409 U.S. 889 (1972), "that no sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official

capacity. Accordingly, we conclude that jurisdiction exists and proceed to the merits." 458 F. 2d at 1208.

In Javits v. Stevens, 382 F.Supp. 131 S.D.N.Y. (1974) District Judge McMann wrote:

> "Thus, in this circuit, at least, state judges are not immune from suits for injunctive relief under §1983, and since plaintiffs seek only injunctive and declaratory relief, we reject defendants' immunity argument." Id. at 136.

There are numerous authorities to the same effect: Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F.Supp. 117, 123-124 (S.D.N.Y. 1969), aff'd 401 U.S. 154 (1971); White v. Flemming, 374 F.Supp. 267 (D.C. Wis. 1974); Martarella v. Kelley, 349 F.Supp. 575, 593 (S.D.N.Y. 1972); Jacobson v. Schaefer, 441 F. 2d 127 (7th Cir. 1971). See also Gregory v. Thompson, 500 F. 2d 59 (1974).

Indeed the law is so clear that District Judge Knapp himself wrote:

> "Plaintiff has requested injunctive relief as well as money damages, and to that extent the doctrine of judicial immunity is inapplicable. Law Students Civil Rights Research Council, Inc. v. Wadmond (S.D.N.Y. 1969) 299 F.Supp. 117, aff'd 401 U.S. 154 (1970). Other courts have commented in passing that §1983 should not be used to provide collateral

review of state court judgments. However, we have found no authority suggesting that as a matter of law a well-supported claim of denial of due process could not be brought under §1983. Defendant relies on Pierre v. Jordan (9th Cir. 1964) 333 F. 2d 951, where the court found that the plaintiff's primary objective was to obtain collateral review of a state court decision rather than to obtain redress of a deprivation of federal rights. Without being bound by the Ninth Circuit's "primary objective" analysis, we find that Terner is earnestly here pursuing such federal rights as he may have. With respect to defendant's contentions concerning res judicata and Rooker v. Fidelity Trust Co. (1923) 263 U.S. 413, we simply observe that plaintiff's essential claim is the alleged corruption of judicial officers before whom he appeared. In view of the ultimate disposition of this motion, it is unnecessary for us to determine whether and to what extent such a claim is appropriately litigated in state court."

POINT II

BECAUSE THE CIVIL RIGHTS ACT OF 1871 PROVIDES FEDERAL REMEDIES SUPPLEMENTARY TO STATE REMEDIES, THE COMPLAINT IS NOT BARRED BY DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL.

A case in point is Lombard v. Board of Education, 507 F. 2d 631 (2d Cir. 1974). Lombard contended that he was denied his First Amendment rights and his Fourteenth Amendment rights to du process when his employment as a probationary teacher was terminated by the New York City Board of Education without his first having received written reasons supporting that termination and an evidentiary hearing. The Board of Education took the position that res judicata barred all of Lombard's constitutional claims on the ground that he had a full opportunity to raise all the issues involved in state court proceedings he brought to challenge the termination of his probationary employment.

The Federal District Court for the Eastern District of New York dismissed Lombard's complaint, but the Second Circuit reversed, saying, in an opinion by District, now Circuit, Judge Gurfein:

> First, when the Civil Rights Act was authoritatively intepreted in Monroe v. Pape, 365 U.S. 167, 183 * * * (1961), the Supreme Court said:
>
> The federal remedy is supplementary to the state

remedy, and the latter need not be first sought and refused before the federal one is invoked.

To apply res judicata to a remedy which "need not be first sought and refused" in the state court, and which actually was not sought would be to overrule the essence of Monroe v. Pape and Lane v. Wilson, 307 U.S. 268, 274 * * * (1939).

Second, if a federal action under section 1983 is considered to be the same cause of action as the state action for purposes of claim preclusion, then a plaintiff desiring to raise a state statutory construction issue or even a state constitutional issue would, and probably should, not be able to raise these points in the federal district court in the first instance. See Reid v. Board of Educ., 453 F. 2d 238 (2d Cir. 1971); Coleman v. Ginsberg, 428 F. 2d 767 (2d Cir. 1970). Here, even if we would like to put all the issues in the same court, we are better off not to compel the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court. See McNeese v. Board of Educ., 373 U.S. 668 * * * (1963). That is what we think choice of forum means in Civil Rights Act cases.

* * *

We think that the problem, strictly speaking, is not a res judicata problem. We think it is rather a question of whether the appellant has "waived" his constitutional rights.

It is not quite fair to say that he "waived" his right to assert in the administrative agency itself that the process afforded was not "due process." For such an attack in the administrative agency itself on the ground of unconstitutionality would be futile. Cf. McNeese v. Board of Educ., supra, 373 U.S. at 675 * * *. See also Judge Friendly's explanation of Damico v. California, 389 U.S. 416 * * * (1967), in Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 * * * (1970); Friendly, Federal Jurisdiction: A General View 100 & n. 111. Nor is the plaintiff required to make the attack in an Article 78 proceeding in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. McNeese v. Board of Educ., supra. Indeed, if waiver is treated as a modality of exhaustion of remedy, the exhaustion, similarly, need not be of the state judicial remedy, but only of the administrative remedy. See James v. Board of Educ., 461 F. 2d 566 (2d Cir. 1972).

* * *

If we treat the problem as a more limited one of collateral estoppel (issue preclusion), policy still prevents its application for the reasons given. At 635-36, 637.

Also, this case cannot be confined to "procedural" due

process and the court so held in Liquifin Aktiengesellschaft v. Brennan, 383 F. Supp. 978 (S.D.N.Y. 1974), saying:

> Bolstering the conclusion that plaintiff is not collaterally estopped from bringing his constitutional claims before this Court is the recent decision in Lombard v. Board of Education. There, the Second Circuit held that due to the uniquely supplementary nature of the remedy represented by 42 U.S.C. §1983, traditional principles of res judicata and collateral estoppel are to be relaxed in civil rights actions. Although it is possible to limit this decision to cases involving procedural due process, such a narrow reading is not called for. Judge Gurfein's opinion is best read as holding that constitutional arguments which can be raised in 1983 actions will not lightly be found to have been waived due to a failure to raise them in a prior state proceeding. At 983.

POINT III

JUDICIAL ACTION IS STATE ACTION UNDER SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. §1983 (1970).

Historically, judicial action was considered state action at the time of the adoption of the Civil Rights Acts. Jidicially, the United States Supreme Court settled the matter in Shelley v. Kraemer, 334 U.S. 1 (1948), involving restrictive covenants. There the Court held:

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consitent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory divisions, it has never been suggested that the state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. At 18.

POINT IV

CIVIL RIGHTS ACTS PROVIDE FEDERAL REMEDIES SUPPLEMENTARY TO STATE REMEDIES.

The remedies provided by Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970), are peculiarly for enforcement in the federal courts. And it is in the federal courts that these remedies have had their greatest development, particularly in the United States Supreme Court.

Historically, these remedies were intended for the federal courts. The United States Supreme Court authoritatively affirmed this fact in Monroe v. Pape, 365 U.S. 167 (1961), and reaffirmed it two years later in McNeese v. Board of Education, 373 U.S. 668 (1963).

Monroe v. Pape, 365 U.S. 167 (1961), involved a civil rights act suit in the federal court based on an illegal search and seizure in Illinois. The Court sustained the suit despite the fact that Illinois, by its constitution and laws, outlawed unreasonable searches and seizures. The Court, after an exhaustive study of the congressional debates, concluded:

> The debates were long and extensive. It is abundantly clear that one reason the legislative was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privi-

leges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. At 180.

After a further study of section 1 of the Civil Rights Act of 1871, the Court ruled:

> Although the legislation was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to Illinois as it is to the States whose names are mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. At 183.

Two years later the Court reaffirmed its holding in McNeese v. Board of Education, 373 U.S. 668 (1963), a Civil Rights Act suit based on the fact that in what was apparently an integrated school in Illinois, the blacks were put in one part of the school and the whites in another. The district court dismissed the complaint because the petitioners had not exhausted their administrative remedies under Illinois law. The Seventh Circuit affirmed, but the Supreme Court reversed, saying:

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first

sought under state law which provided a remedy. At 671. Accord, Wilwording v. Swenson, 404 U.S. 249 (1971).

Under section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970), the federal courts have given not only compensatory damages but declaratory and injunctive relief as well. Moreover, the courts have held that these provisions are an exception to the anti-injunction statute, 28 U.S.C. 2283 (1970). The United States Supreme Court approached this question in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), rev'g. 318 F. Supp. 1111 (D. Conn. 1970), and settled it in Mitchum v. Foster, 407 U.S. 225 (1972).

In Lynch v. Household Finance Corp., a three-judge federal district court in Connecticut refused to consider the constitutionality of Connecticut prejudgment and garnishment statutes "for lack of Civil Rights Act jurisdiction," 318 F. Supp. at 1114. But the Supreme Court reversed and remanded the case. Justice Stewart pointed out:

> Because of the extrajudicial nature of Connecticut garnishment, an injunction against its maintenance is not, therefore, barred by the terms of §2283. In light of this conclusion, we need not decide whether §1983 is an exception to §2283 "expressly authorized by Act of Congress." We have explicitly left that question open in other decisions. And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a

proceeding "in a State court" within the meaning of §2283. 405 U.S. at 556.

Later in the term, in Mitchum v. Foster, 407 U.S. 225 (1972), the Court did hold that the Civil Rights Act remedies were within the exception of 28 U.S. §2283 (1970), Mitchum v. Foster involved a state obscenity proceeding. The Court, in an opinion by Justice Stewart, reasoned:

Section 1983 was originally §1 of the Civil Rights Act of 1871. 17 Stat. 13. It was "modeled" on §2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of "enforc(ing) the Provisions of the Fourteeenth Amendment." 17 Stat. 13. The predecessor of §1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era -- and especially the Fourteenth Amendment, which was its centerpiece -- the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Monroe v. Pape, 365 U.S. 167; McNeese v. Board of Education, 373 U.S. 668; Shelley v. Kraemer, 34 U.S. 1; Zwickler v. Koota, 389 U.S. 241, 245-249; H. Flack, The Adoption of the Fourteenth Amendment (1908); J. tenBroek, The Anti-Slavery Origins of the Fourteenth Amendment (1951). Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the

claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

* * *

It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, * * * whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights. At 238-40.

Justice Stewart then gave a review of legislative history and concluded for the Court:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. At 242.

Recently in Carr v. Thompson, 384 F. Supp. 544 (W.D.N.Y. 1974), involving the refusal by the defendants to allow the

plaintiff to take a certain Civil Service examination, Chief Judge Curtin, in giving injunctive relief, concluded:

> The defendants have not made a motion to dismiss based on improper jurisdiction, but they argue in their brief that plaintiff could have proceeded by way of an Article 78 proceeding pursuant to the New York Civil Practice Law and Rules, and that jurisdiction of this action by this court is improper. In construing the Civil Rights Act, the Supreme Court has held that a federal remedy under the Civil Rights Act is supplementary to any remedy that may exist under state law, and that it is not necessary to seek the state remedy before invoking the federal one. See Monroe v. Pape, 365 U.S. 167, 183 * * * (1961); Wilwording v. Swenson, 404 U.S. 249 * * * (1971). Therefore, the court finds that jurisdiction is proper. At 547.

POINT V

KRAFTCO CORP. ADMITS THAT IT HAD NOTICE OF APPELLANT'S FEDERAL CLAIMS.

At the top of page 5 of the BRIEF OF DEFENDANT-APPELLEE KRAFTCO CORPORATION the following statement is made:

> On July 28, 1975, plaintiff, who was then represented by counsel, told Kraftco that he intended to commence an action in the federal courts naming Kraftco (JA 25).

That statement is not accurate since it can be seen in the record (Record, No. 2) that both Krafto Corp. and its transfer agent

Mfg. Hanover Trust Co. were actually served with plaintiff's original summons and complaint on July 28, 1975 in an action instuted in the U.S. District Court for the Southern District of N.Y. Both Kraftco Corp. and its transfer agent Mfg. Hanover Trust Co. had received no less than four certified letters cautioning them not to turn over to Mildred Terner (now known as Mrs. Jerald S. Kalter) the shares of stock and accrued dividends pending the final determination by the federal courts of the true ownership of subject stock and accrued dividends.

Yet, despite four certified letter-notices and their acknowledgement of having been properly served with subject summons and complaint on July 28, 1975, Krafto Corp.'s transfer agent on July 31, 1975 issued new certificates in the name of Mildred Terner and also turned over accrued dividends to Mildred Terner (Record, No. 20, Ex. 5 [Exhibit A thereto]).

Krafto Corp. and its transfer agent Mfg. Hanover Trust Co. acted in a manner that made a substantial contribution to denial of appellant's constitutional rights.

CONCLUSION

Against the judges who are defendants the appellant asks for declaratory and injunctive relief.

Against the other individual defendants, jointly and severally, the appellant asks for compensatory and punitive damages in an amount of $1 million per year for the past six years during which appellant has been denied Due Process and Equal Protection for a total of $6 million.

As for the two corporate defendants, Kraftco Corp. and Mfg. Hanover Trust Co. (Transfer Agents for Kraftco Corp.), appellant herein seeks $60,000 which is predicated upon the illegal turning over of some $30,000 of assets to Mildred Terner (now known as Mrs. Jerald S. Kalter) and the additional $30,000 is for punitive damages, interest, legal and legal related expenses therein.

For the past six years I have been more hamstrung than the most persecuted minorities in pursuit of human rights by the denial of Equal Protection and Due Process of Law. Let appellant at long last, at least, see the end of the tunnel.

Respectfully submitted,

WILLIAM TERNER, Pro Se
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Assisted by: O. JOHN ROGGE
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777 Third Avenue (Rm. 3100)
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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM TERNER ,pro,se.,
Plaintiff- Appellant,

Index No.

- against -

Affidavit of Personal Service

JAMES D. HOPKINS, LEONARD RUBENFELD, JACK DEMPSEY,
ALVIN R. RUSKIN., HAROLD L. WOOD, BERNARD G. GORDON
MARTIN, B. STECHER,WM. A. WALSH JR., JERALD S. KALTER
JOHN C. MARBACH, MILDRED TERNER: KRAFTCO CORP.,
MFG. HANOVER TRUST CO.,
Defendants- Appellees.

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Jmaes A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the 25th *day of* August *19* 76 *at* Two World Trade Center, New York, NY

deponent served the annexed Reply Brief *upon* Louis Lefkowitz

the Attorney *in this action by delivering* 3 *true copy*s *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 25th
day of August *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 31-4503250
Qualified in Queens County
Commission Expires March 30, 1978

James A. Steele
JAMES A. STEELE

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

WILLIAM TERNER, pro se,
Plaintiff- Appellant,

- against -

JAMES D. HOPKINS: LEONARD RUBENFELD: JACK DEMPSEY:
ALVIN R. RUSKIN, HAROLD L. WOOD: BERNARD G. GORDON:
MARTIN B. STECHER: WM A. WALSH JR: JERALD S. KALTER:
JOHN C. MARBACH, MILDRED TERNER: KRAFCO CORP.,:
MFG HANOVER TRUST CO.,
Defendants- Appellees.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 25th *day of* August *19* 76 *deponent served the annexed*

Reply Brief *upon* see attached *attorney(s) for*

see attached *in this action, at* see attached

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* s *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 25th
day of ~~August~~ August *19* 76

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4023156
Qualified in Queens County
Commission Expires March 30, 1978

Eugene L. St. Louis
Print name beneath signature

EUGENE L. ST. LOUIS

~~Louis Lefkowitz~~
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